



Energy and Telecommunications Interim Committee

58th Montana Legislature

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September 4, 2003

TO: Energy and Telecommunications (ET) Committee Members

FR: Todd Everts, Legal Staff

RE: Additional Northwestern Bankruptcy Issues

The purpose of this memo is to address the following bankruptcy issues and questions raised by ET Committee members:

1. What could happen to qualifying facility contracts if NorthWestern Energy files for bankruptcy?
2. Is there anything that the Legislature can do to protect universal system benefit funds during a bankruptcy proceeding?
3. What is the state's role with respect to a bankruptcy restructuring plan in a NorthWestern bankruptcy proceeding?

In the interest of non duplication, I will not be providing a primer on utility bankruptcy law in this memo. For an excellent over-all analysis of utility bankruptcy law, dig out the memo that Mary Vandebosch sent you authored by PSC attorney Al Brogan entitled: "General Information on Utility Bankruptcy". Ms. Vandebosch also emailed each ET Committee Member an excellent synopsis on utility bankruptcy law on July 10, 2003.

1. What could happen to qualifying facility contracts if NorthWestern Energy files for bankruptcy?

Under the U.S. Bankruptcy Code (11 U.S.C. sec. 365(a)), a bankruptcy trustee or a debtor in possession can reject any executory contract of a debtor, subject to bankruptcy court approval. If a trustee or debtor in possession "rejects" a contract, both parties to the contract are released from further obligations under the contract. A rejection of a contract constitutes a breach of the contract and the breach is determined to occur at the time the bankruptcy petition was filed. In determining whether to reject a

formally designated as a creditor provides the most leverage in a bankruptcy proceeding. The goal of a bankruptcy court in a Chapter 11 bankruptcy is to organize and classify all creditors' claims and interests and subsequently discharge those claims and interests. Initially, the debtor in bankruptcy has an exclusive period in which to file a bankruptcy plan. After that period has expired, a creditor, a party-in-interest or even an intervenor (if the court allows it) can propose a restructuring plan. Only creditors are entitled to vote on whether to accept the restructuring plan. The bankruptcy court must ensure that the plan is in the best interests of the creditors and that the plan is fair and equitable to each class of creditors.

The obvious question is how can the state of Montana be designated as a creditor? Under the U.S. Bankruptcy code, a creditor is "an entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor" (11 U.S.C. sec. 101(10)). The likely scenario here would be that NorthWestern Energy would owe the Department of Revenue (DOR) back taxes entering into a bankruptcy proceeding. If back taxes were owed, a bankruptcy court could designate DOR as a creditor and the state would have its proverbial foot in the bankruptcy proceeding door. Absent being designated a creditor, the DOR or other state entities like the Public Service Commission (PSC), the Consumer Counsel, or the Attorney General's Office could request a party-in-interest designation or intervenor status from the bankruptcy court.

What is unclear is whether different state entities would have different interests or roles in a bankruptcy proceeding. This issue highlights a potential need for a coordinated state effort. A potential option would be to establish a state task force to coordinate the state's interests and role in a NorthWestern bankruptcy proceeding.

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